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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 926

LEONARD S. GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Leonard S. Gordon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case February 18, 1953 (R. 102).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1), Section 240 of the Judicial Code, and Rule 37 (b) (2) Federal Rules of Criminal Procedure.

The Court of Appeals for the Ninth Circuit affirmed a judgment of conviction on February 18, 1953 (R. 102). Petitioner filed for rehearing, which was denied on March 18, 1953 (R. 103). This petition was filed within thirty days in accordance with the rules. Issuance of the mandate has been stayed by the Court of Appeals for the Ninth Circuit.

Opinion Below.

The District Court wrote no opinion. The opinion of the Court of Appeals (Mathews, Healy and Bone, Circuit Judges) has not yet been reported, and is contained in the record at pages 97-101.

The substantive portion of the opinion in this case, deciding the numerous issues presented in petitioner's opening brief before the Court of Appeals is contained in the words "The evidence is sufficient to sustain the verdict and judgment as to each count of the indictment" (R. 100, lines 5-7), and "* * * we have considered all paragraphs of the specification, have examined the entire record and have found no reversible error. Judgment affirmed." (R. 101, lines 23-25).

The balance of the opinion is devoted to a recital of the indictment and a summary of the mislabelled specifications of error (which were followed in the appellant's opening brief by 89 pages of discussion, full record references, etc., and an Appendix of 159 pages setting forth *totidem verbis* the rejected instructions, and evidence, rulings, grounds of objections, etc., referred to in the brief).

From those substantive portions of the opinion, it is impossible to determine the Circuit Court's view of the law applicable to this case.

Statute Involved.

Petitioner was prosecuted, convicted and sentenced under Section 145 (b) of the Internal Revenue Code, Title 26, U. S. Code.

Statement of the Matters Involved.

The judgment herein of the Court of Appeals for Ninth Circuit affirmed a judgment of conviction of petitioner for wilfully attempting to defeat and evade the income tax for himself and his wife for the years 1945 and 1946, in violation of section 145 (b) of Title 26, U. S. Code.

The indictment included four counts (R. 2-5). Counts 1 and 3 charging that petitioner wilfully attempted to defeat and evade the payment of his personal income tax by understating his income for 1945 and for 1946, respectively; counts 2 and 4 charging petitioner with a similar offense as to his wife's income tax for 1945 and 1946, respectively.

Petitioner was tried by a jury and convicted on all four counts. The evidence was in the main circumstantial.

The evidence was circumstantial, and on its face as consistent with innocence as with guilt. Aside from the question as the sufficiency of the evidence, there occurred during the trial various incidents which resulted in a denial of due process.

In obtaining the conviction the prosecution had to establish that a substantial amount of income was in fact omitted from the income tax returns. This was not and could not be established, for the prosecution relied upon the testimony of Internal Revenue Agents, in this connection, who admittedly did not audit the income tax returns involved in this case, but concluded that any sums they could not trace to the general ledgers, were necessarily not on the returns. They merely examined some records, including the general ledger, but did not audit the records or the ledgers. Due to the failure of accountants, bookkeepers and others employed by petitioner to handle his books and returns, to properly perform their duties, the books, through no fault of petitioner, were not kept in a normal manner, and fail to disclose the source of all the income recorded upon them. The agents, by use of so-called proper or correct accounting theories, concluded that the sack and cull bean income involved in this case was not on the books because it did not appear identifiably on those portions of the vast number of books and records where normally they should have

appeared. The general ledgers were shown, by uncontradicted testimony, to include "forcing entries," made by petitioner's bookkeepers and others, unbeknown to petitioner, to bring the books into balance, in sums many times in excess of those purportedly omitted from the unaudited income tax returns, and included "miscellaneous" sales and income which could readily have included the allegedly unreported sums.

The so-called expert testimony of these agents and "summaries" prepared by them and received in evidence, were based only in part upon evidence in the record, and in part upon matters outside of the record.

The prosecution also introduced in evidence certain "amended returns" as admissions against interest; these "amended returns" had been furnished to and obtained by the agents for the purpose of compromising the tax liability of petitioner. The evidence as to this aspect of the case is uncontradicted, and emanates from a highly respected member of the California Bar, and a former Internal Revenue Agent.

The trial court refused to give to the jury numerous instructions proferred by petitioner stating law favorable to his defense and related thereto, thereby depriving him and the jury of a full and correct statement of the law.

Petitioner's conviction on Count 1 as well as Count 2 and upon Count 3 as well as Count 4, constituted double jeopardy.

Questions Presented.

Did the Court of Appeals err in:

1. Holding that the evidence was sufficient to sustain the conviction of petitioner?

2. Holding, by its general statement that there is no reversible error, that no reversible error was committed by the receipt in evidence of "summaries" of facts in the case

The conviction was thus obviously largely brought about by the presence in this case of these evidentiary items which had no place in the record.

Argument

1. *The evidence was not sufficient to satisfy the minimum requirements in a circumstantial evidence case.*

The evidence here, consisting of more than 1700 pages of testimony and many exhibits, was as consistent with innocence as with guilt. Petitioner was not shown personally to have had anything to do with recordmaking or bookkeeping as to any of the literally millions of sales made by his many employees, particularly with regard to sales of sacks and culls. Each of the employees who actually handled the sales of these items and recordmaking incident thereto, absolved petitioner of any interference with or intrusion into their procedures or activities, and the employees directly concerned with these processes admitted that their instructions came from their predecessors, and not petitioner, and that they followed precisely the same procedures in prior years, when income from sales of sacks and culls is demonstrably included in the income reported on the income tax returns for those years, as was followed in the years 1945 and 1946 (R. 163, 198, 232, 267-273, 278, 287, 357, 409, 1258-1262, 1335, 1545, 1749. See also 1074, 1258; Pet.'s Exbs. DG, X and Y).

As pointed out in our petition herein, in obtaining the conviction, based upon circumstantial evidence, the prosecution relied in great part upon the testimony of internal revenue agents, who admittedly did not audit the income tax returns involved in this case, and did not audit the general ledgers upon which the returns were presumably based, but relied upon an accounting theory to reach the conclusion that the sack and cull bean income was omitted from the returns because the cash receipts did not appear on these

books where they "normally" would (R. 443-447, 457, 506-525, 548, 570-596). The general ledgers were shown, by uncontradicted testimony, to include "forcing entries" by petitioner's bookkeepers and others, unbeknown to petitioner, to bring them into balance, and "miscellaneous" sales and receipts in sums many times in excess of those purportedly omitted from the unaudited income tax returns (e.g. R. 640-658, 669-670, 696-706, 793-811, 1345-1448).

The agents whose "expert" testimony constitutes the sole evidentiary basis for a conclusion that any income was in fact omitted from the returns, thus merely assumed that the sack and cull income was omitted from the returns because they could not trace the *receipt of the cash payments* for such sales onto the general ledger. But the returns admittedly reported all income on the accrual basis (R. 575, 637) and even the agents admitted that recordation of cash received was immaterial (R. 575-8) and, aside from the agents' theoretical accounting approach (see, e.g. R. 443, 457-458, 461-462, 505-509, 515-518, 568-570, 579-612) there is no direct evidence that any part of petitioner's or his wife's income was in fact omitted from their income tax returns.

Plainly the mere fact that petitioner is shown to have received and spent the income from sacks and culls is not sufficient to prove beyond a reasonable doubt that his income tax return understates his income in any respect. And the application of theoretical accounting concepts cannot take the place of actual proof of omission of income from the returns, particularly where it is shown that petitioner's accountants and bookkeepers were incompetent and used forcing entries to balance the books which contained numerous "miscellaneous" sales and income accounts which could readily have included the sums involved in this case. The agents' theoretical approach must necessarily fall, when it is demonstrated that the keystone to their approach—prop-

erly balanced books—is a sham because of fictitious forcing entries used to bring about the balance. A conviction in this type of case should not be sustained upon such a theoretical approach, where the agents testifying as to the omissions admit that they merely "spot-checked certain items" (R. 508-509), and did not examine all the records upon which the income in question could normally have been included (R. e.g., 446-448, 457, 505-509).

In a recent somewhat parallel case, *Michael Caserta v. United States*, 199 F. 2d 905, the third Circuit reversed an income tax conviction because the agents assumed but did not properly investigate or separate the facts as to income. The holding enunciated in that case appears to be in conflict with the decision in this case.

In the light of the decisions in the *Spies*[a], *Loffman*[b], *Lurding*[c], *Tinkoff*[d], *Hargrove*[e], *Fenwick*[f], and other cases, the Court of Appeals should have reversed the instant conviction.

2. *The "summaries" are based in part on evidence outside the record and should not have been received in evidence.*

Purported "summaries" of certain technical data as to petitioner's finances affecting the correctness of the returns were introduced in evidence, by the prosecution, and extensive testimony was given as to these summaries (R. 464-465, 502-504, 530-547, 557-558; Govt. Exhs. 29, 30). These were based in part on matters outside the record of this case, including "work-papers" prepared by the agent, not in evidence, and from other sources outside the record in this case (R. 531, 547-548, 560-568, 623-624). All this was done contrary to established law that summaries must be based only on evidence in the record. See e.g., *United States*

[a]317 U.S. 492.
[b]152 F 2d. 393.
[c]179 F 2d. 419, 422.
[d]86 F 2d. 868, 880.
[e]67 F 2d. 820.
[f]177 F 2d. 488, 492.

v. Johnson, 319 U. S. 503; *Carlson v. United States,* 187 F. 2d 366; *United States v. Loffman,* 152 F. 2d 393; *United States v. Venuto,* 182 F. 2d 519.

Without these "summaries" the jury could hardly have understood what was the prosecution's basis for asserting that the returns understated the correct income. The receipt of such summaries in evidence plainly constituted grave prejudice to petitioner which requires reversal of his conviction.

3. *The amended returns for 1945 and 1946 were erroneously admitted in evidence.*

The prosecution introduced in evidence (R. 471-501), the amended income tax returns, as well as the originals, of petitioner and his wife, Frances Gordon, for the years 1945 and 1946 (Exs. 1, 2, 3, 4, 6, 8, 10, 12). This case did not involve the amended returns as such: it was based upon the original returns for 1945 and 1946.

The trial court admitted the amended returns in evidence (R. 502-503) and rejected petitioner's request that testimony on *voir dire* be taken to show the circumstances surrounding the preparation and filing of the amended returns (R. 500), leaving the issue as to admissibility to the jury.

These returns were admitted into evidence upon the theory that they constituted admissions by petitioner (R. 499).

The testimony of petitioner's then attorney, his tax adviser, and petitioner himself, as to the circumstances under which these amended returns were filed was not contradicted (see R. 485-487, 824-828, 976-993, 997-999, 1551-1561, 1659-1663).

For some time preceding the return of the indictment against petitioner, his tax adviser and legal representative were endeavoring to bring the civil controversy with the Treasury Department relative to the petitioner's income

and testimony relative thereto, which "summaries" were based in part upon alleged facts outside of the record in this case?

3. Holding, similarly, that no reversible error was committed by the receipt in evidence of "amended returns," originally submitted as offers in compromise, as admissions against interest?

4. Holding, similarly, that no reversible error was committed by the rejection by the trial court of proferred instructions as to the law?

5. Holding, similarly, that petitioner was not placed in double jeopardy by his conviction upon both counts 1 and 2, and both counts 3 and 4?

Reasons for Allowance of the Writ.

1. The decision herein sustaining the conviction appears to be at variance and in conflict with the various decisions of the Circuits cited in our brief in support of this petition relating to the proof necessary to establish in a criminal case the fact of omission of income from income tax returns, and the decisions holding that in a case involving conviction upon circumstantial evidence, the trial court may not leave to a jury the determination of guilt where the evidence on its face is as consistent with innocence as with guilt. That is clearly the case here.

2. The record contains numerous instances of denial of due process by the admission in evidence of matters which have no probative value and do not constitute legally admissible evidence.

3. A decision of a Court of Appeals in a criminal case should set forth in some detail the legal grounds upon which the appellant's contentions are overruled, so that this Court can determine the legal standards upon which the Court of Appeals acted, and determine whether those legal standards are in accord with the decisions of this Court and are in

harmony with the approved decisions of other Circuits.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Court to the Court of Appeals for the Ninth Circuit commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of proceedings of that court herein, being the case numbered and entitled on its docket as *"Leonard Gordon, appellant, vs. United States of America, appellee.,"* No. 13197, and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: April 14, 1953.

LEONARD S. GORDON,
Petitioner

BY WILLIAM STRONG,
Attorney for Petitioner

BRIEF IN SUPPORT OF PETITION.

Statute Involved.

The Statute under which petitioner was indicted, convicted and sentenced, Section 145 (b) of Title 26, U. S. Code, provides in its pertinent part:

> "* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, * * *."

Statement of Facts.

The Indictment

The indictment contains four counts, each charging a separate violation under the above quoted statute: Count 1 charges that petitioner wilfully attempted to defeat and evade the payment of *his* income tax for 1945 by understating his income; Count 2—to the same effect, but that petitioner violated the law by understating his *wife's income* on her return for 1945; Count 3—same as in Count 1, but as to the year 1946; Count 4—same as Count 3, as to appellant's wife's income for 1946 (R. 2-5).

The Evidence

Petitioner in 1945 and 1946 was the sole owner of a huge concern selling beans and other ferinacious products, employing hundreds of persons, including numerous bookkeeping and accounting employees. In 1945 the gross income reported by petitioner was in excess of $4,000,000 and in 1946 in excess of $5,000,000. Since 1932, petitioner had always used as his "take-home pay" the income from the sale of empty sacks, broken beans and other culls (R. e.g., 1457, 1488-1490, 1514-1517, 1543-1545).

Petitioner did not handle personally any of the vast number of invoices, records and books required for these opera-

tions. Due to apparent mishandling of the bookkeeping system by the bookkeepers and accountants, the books for the years in question here are in a complete state of confusion, having been brought into balance by forcing entries, and containing many "miscellaneous" sales and income accounts, composed of unidentifiable items totalling literally hundreds of thousands of dollars in excess of the allegedly unreported sums.

The Internal Revenue agents in the case did not audit the income tax returns on which the conviction in this case is based; they simply examined some of the *cash receipts* records, on which they found no entries as to the sack and cull income (R. see *infra*). Although the books were kept on the *accrual* basis (R. 575-578, 637), the agents concluded that this income was omitted in the income tax returns because it was not recorded in the cash receipts journals, whose totals were supposedly reflected in the overall general ledgers. The latter, however, had been forced into balance by petitioner's employees and accountants, and were incapable of analyses as to source of funds.

Thus without auditing the income tax returns themselves to determine whether they in fact did or did not report the full income subject to tax, the Internal Revenue agents assumed that the returns did not include that income (R. see *infra*).

To support its case, the prosecution in part introduced in evidence "amended returns," signed and filed by petitioner under circumstances clearly negating the effectiveness of these returns as admissions against interest of the purported facts contained in them (R. see *infra*). In addition, the prosecution was permitted to introduce in evidence so-called "summaries" of the evidence, which were in fact based in important respects upon evidence outside of the record (R. *infra*).

to an end.

The figures of additional income contained in the amended returns were not the product of petitioner or his advisers and could not be checked by them because of the chaotic state of the books and records; they were produced by the internal revenue agents in this case, and were merely accepted by petitioner as a means of disposing of the entire case without any intention on his part of admitting the existence of any unreported income or of any unpaid taxes. Due to the chaotic state of the records brought about by petitioner's employees, through no fault of petitioner, the agents' claims could not be negatived by proof as required in civil tax cases. As a result, it was decided to pay the extra tax. But petitioner has at no time conceded that there were any unpaid taxes for 1945 or 1946.

These returns were filed unwillingly by petitioner, with a letter, upon the advice of advisers that such amended returns were necessary to close the entire tax matters, and upon their belief, based upon their past experience and dealings with internal revenue agents, that this was the fact.

In causing petitioner to file the amended returns, his tax advisers acted upon the well-known policy of the Bureau of Internal Revenue, stated by the Assistant Head of the Penal Division, Office of the Chief Counsel, Bureau of Internal Revenue:

> "While the case remains open on the prosecution question, established Bureau policy precludes any attempt to reach a settlement of the civil liability."[8]

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[8]Richard C. Schwartz, Assistant Head of the Penal Division, Office of Chief Counsel, Bureau of Internal Revenue, TAX FRAUD CASES, Practice and Procedure, American Bar Association, Section on Taxation, Matthew Bender & Co. Symposium held in Washington, D. C., September 19, 1950 (p. 20, lines 20-23).

Petitioner, in reliance upon this advice, and for the purpose of a civil settlement only, signed the amended returns.

In a situation such as this the amended returns clearly do not constitute admissions, and should not have been received in evidence. Moreover, the determination as to their admissibility was for the Court, and should not have been left to the jury.[h]

The statutory law of California states that ". . . an offer of compromise is not an admission that anything is due." (Code Civ. Proc., Sec. 2078).

As stated in *Reinderl v. United States*, 150 F. 2d 493, 497:

> "It is impossible, however, by approval to stigmatize the many thousands of taxpayers who file amended returns as persons admitting, by such filing, that their original returns were false and untrue. . . . There should be no discouragement in the filing of an amended return and no hazard in doing so."

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[h]The jury instruction in this connection sought by appellant was not given by the Court (App. 4). The instructions given to the jury read:

The Court: "You may consider whether, under all of the circumstances in this case, these amended returns constitute an admission that the original returns were incorrect, as is contended by the Government or whether, as contended by the defendant, their filing is evidence of good faith on his part in correcting errors in the original returns when discovered by him." (1313)

The Court: "An admission is a statement or acknowledgment of the defendant, made on occasion other than this trial, tending to prove his guilt of alleged crime for which he is on trial.

"An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledged a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial." (1311.)

"An admission . . . must be the acknowledgment of a fact and not a mere opinion." (*Coca-Cola v. Munn,* 99 F. 2d 190.)

"The law favors attempts to compromise and settle litigation, and, for that reason, will not permit one party to a settlement attempt to introduce against the other, over objection, statements made to induce a compromise or in the course of negotiations to that end." (Citing *West v. Smith,* 101 U. S. 263; *Lowenstein v. Federal Rubber Co.,* 85 F. 2d 129; *Arnold v. Owens,* 78 F. 2d 495; *Hawthorne v. Eckerson,* 77 F. 2d 844." *Cyclopedia of Federal Procedure* (2nd Ed.) Volume 7, Section 3186, page 258.

"It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction. * * * No party to a justifiable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away." *Brown v. Pacific Electric Ry. Co.,* 79 Cal. App. 2d 613, 180 P. 2d 424 (1947).

See also: *In re Graves,* 182 Fed. 443 (1910); *Shipley v. Pittsburgh & Ler Co.,* 83 Fed. Supp. 722 (1949); *Bratt v. Western Air Lines,* 169 F. 2d 214 (1948, 10th Cir.); *Martin v. Burgess,* 28 F. 2d 321, 323.

4. ***The trial court failed to give to the jury full and correct instructions as to the law and, specifically refused and failed to give to the jury certain of the instructions offered by petitioner.***

The trial court, "In a criminal case * * * must instruct on all essential questions of law involved whether or not it is

requested to do so." (*Samuels v. United States,* 169 F. 2d 787, 792 (C.C.A. 9); *Morris v. United States,* 156 F. 2d 525 (C.C.A. 9))

There was much evidence in the record supporting petitioner's factual contentions, as to which he sought, but the trial court nevertheless did not give certain instructions. Petitioner was entitled to have the jury instructed along the lines requested by him, even if not in the precise language sought.

Thus, the trial court refused to give petitioner's proposed instructions relative to the defense of reliance upon accountants and others and upon the activities of others, as to his non-culpability where there was present negligence of others, and reliance upon an established course of conduct (R. 30, 50-53, 54); as to the meaning of the term "substantial" (R. 32-33); as to the necessity for the prosecution to establish the fact of omission of income from the returns and taxes due (R. 33, 42-43, 47-48); as to evidence of wilfulness, good faith, etc. (R. 37, 46-50, 54-55); as to the legal assumption that witnesses subpoenaed and not called to the stand would have testified adversely to the subpoenaeing party (R. 34).

Instructions offered by petitioner were also refused by the trial court relative to the keeping of books where taxes are paid on accrual basis (R. 35); what constitutes a "record," etc. (R. 35, 36); concerning amended returns as admissions (R. 35); circumstantial evidence (R. 45-46).

As a result, the jury was not correctly and fully instructed in the law as it applied to petitioner's version of the facts and to petitioner's defense.[1]

[1]While the Court of Appeals states in its opinion that these instructions were not before it, the fact is that they were included, *totidem verbis,* in the Appendix to the brief before that court, in compliance with the rule of that all quoted matters of more than two pages in length must be included in a printed appendix to the brief. (R. 32-56.)

5. *The trial court erred in overruling petitioner's motion to strike certain counts in the indictment on grounds of double jeopardy.*

Petitioner moved to dismiss Counts 2 and 4 on grounds of double jeopardy (R. 4).

These Counts involved Mrs. Gordon's community property share of petitioner's income, and reflected merely a distribution of the figures on petitioner's own returns. The returns were merely the instrumentality of the crime charged; the crime alleged was one and the same for both counts for each year, namely, a wilful attempt to defeat and evade the tax for that year upon the same income. The same evidence was introduced for both counts for each year, except that there were separate returns for each year for petitioner and his wife.

As counsel for the prosecution admitted in argument on this point before the trial court (R. 13) that "this arises out of the same transaction. This is one offense for the year of 1945 and one offense for the year 1946, * * * there is actually one offense, but the one offense is divided into two counts * * *" (R. 13). "* * * it is one offense but in two counts * * *" (R. 14). "* * * it is all a part of the same offense and the fact that the facts may be the same in the two counts, the offense is still one offense for the same year separated into separate counts." (R. 15.)

That was precisely petitioner's complaint: one offense was divided by the prosecution into two counts. (See, e.g., *Blockburger v. United States,* 284 U. S. 299.) *Constitution of United States,* Amend. V; *Romley v. Welch,* 114 F. 2d 499; *Clawson v. Rives,* 104 F. 2d 240; *Levin v. United States,* 5 F. 2d 598; *Brewster v. Swope,* 180 F. 2d 984 (C.C.A. 9); *United States v. Bridges,* 86 F. Sup. 922; *Ross v. United States,* 103 F. 2d 600 (C.C.A. 9); *King v. United States,* 31 F. 2d 17 (C.C.A. 9), affd., 280 U. S. 521.

Counts 2 and 4 should have been dismissed.

Conclusion.

It is respectfully submitted that upon the grounds set forth herein, the petition for a writ of certiorari should be granted by this Court.

Respectfully submitted,

WILLIAM STRONG,

Attorney for Petitioner

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Sec. 145	2
Miscellaneous:	
IV Wigmore, *Evidence* (3d ed. 1940):	
Sec. 1048	15
Sec. 1061	15

255701—53——1

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 726

LEONARD S. GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 97–101)[1] is reported at 202 F. 2d 596.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1953 (R. 102), and the petition for rehearing was denied March 18, 1953 (R. 103). The petition for a writ of certiorari

[1] The record in this Court consists of six typewritten volumes. The pagination of Volume I runs from 1 to 104. The pagination of Volume II through Volume VI runs from 1 to 1759. References to Volume I will be designated "R." References to the other volumes will be designated "Tr."

was filed April 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court erred in admitting "summaries" of the evidence as to petitioner's records and returns.

3. Whether the trial court erred in admitting the amended returns for 1945 and 1946.

4. Whether the trial court properly and fully instructed the jury.

5. Whether the counts involving the wife's returns charged offenses identical with the counts involving petitioner's returns.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the

payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. [1946 ed.] 145.)

STATEMENT

On March 14, 1951, a four-count indictment was filed against petitioner in the United States District Court for the Southern District of California. Count One (R. 2–3) charged that on or about April 15, 1946, petitioner filed a false income tax return, wherein he stated that his net income for the year 1945 was $29,575.63 and that the tax due was $12,765.27 although he knew that his net income was $39,507.62 and that the tax due was $19,374.52, thus wilfully attempting to evade a large part of the tax in violation of Section 145 (b) of the Internal Revenue Code. Count Two (R. 3) charged petitioner with a similar attempt to evade his wife's income taxes for 1945 in an equal amount, computed on the community property basis. Count Three (R. 4) charged petitioner with attempting to evade his income taxes for 1946 by filing a false return in which he stated that his net income was $7,920.71 on which a tax of $1,411.90 was due, whereas he knew that his net income was $19,719.31 and that the tax due was $6,000.42. Count Four (R. 4–5)

charged petitioner with a similar attempt to evade his wife's income taxes for 1946. After a jury trial petitioner was convicted on all four counts. (R. 57–59.) On October 22, 1951, he was sentenced to consecutive terms of imprisonment for three years on Counts One and Three and fined $10,000 on each. Execution of the prison terms was suspended, however, and he was placed on probation for five years. Similar terms of imprisonment were imposed on Counts Two and Four, to run concurrently with the terms on Counts One and Three, respectively, and execution was likewise suspended as to these. (R. 85–88.) The Court of Appeals affirmed (R. 97–102.)

The evidence to support the verdict may briefly be summarized as follows:

During 1945 and 1946 petitioner was the sole proprietor of Grocers Packing Company[2] (Tr. 129, 135, 194, 1441), through which he bought dried beans and other dried foods in the bulk, placed them in small family-size packages, and then resold them to grocers (Tr. 631–633, 1438–1443). From a very small beginning in 1932 (Tr. 1438–1440) the business grew until its gross yearly income amounted to about $5,000,000 during the period involved here (Tr. 461–462, 726, 1448–1449). Part of this income was derived from salvage, by reselling the bags in which the bulk beans were received, and by selling spoiled or "cull" beans to farmers as hog feed. The

[2] The business was incorporated early in 1947 (Tr. 1590).

Government's proof showed that the business received $19,863.97 from such sources during 1945, and $23,597.20 during 1946. (Tr. 28–32, 33–39, 40–42, 50–53, 61–64, 89–93, 526–527, 532–534, 549–551.)

William F. DeMaris testified that he was office manager for the company from 1943 to January 1945; that he set up a new system of accounts shortly after taking over, and in so doing discovered that the income from the sacks and "cull" beans was not being entered on the books; that he was informed by petitioner that he had always appropriated this income himself in lieu of a salary and it was not to be set up on the books; and that he thereafter kept no records of this income. (Tr. 122–138, 151–152, 172–173.) Edward J. Beaumont testified that he succeeded DeMaris as officer manager and that he also knew about the unrecorded income, but that he was told by petitioner that it was being reported on his personal income tax returns and that he did not want it handled in the regular accounts. (Tr. 184–195.) Theodore Rose testified that he had charge of the books during 1945 and part of 1946 and that he knew of no income from sacks and "cull" beans, although the records of such transactions should normally have come across his desk. (Tr. 204, 212–213.)

Pearl Diamond testified that she was in charge of accounts payable from 1944 to 1947 but that she also handled certain accounts receivable, *i. e.*,

the income from the sacks and "cull" beans; that when such a sale was made, she made out an invoice in triplicate, gave two copies to the purchaser and kept the other in her desk; that when she received the check from the office manager or from petitioner's secretary she attached the invoice to it and gave it to petitioner; and that she made no record of these transactions in the books and never saw the invoice after she had given it to petitioner. (Tr. 265, 267–269, 272–273, 277.) Margaret Hundsdoefer, petitioner's secretary from 1944 to 1948, testified that she opened all mail delivered to the main plant and routed it to the department concerned; that all checks were routed to the accounts receivable department, with the exception of checks in payment for sacks and "cull" beans which were routed to Miss Diamond; and that she made no record of incoming checks. (Tr. 228, 230–232, 248.) Daniel Blacher, credit manager from 1944 through 1946, testified that it was his duty to see that all accounts receivable were collected, to enter the amounts in the cash receipts book, and to deposit the funds in the bank in the account of the Grocers Packing Company; that there were no accounts receivable on the books for customers who bought sacks and "cull" beans, and that checks from these customers did not come to him normally; that if such checks did come to him he turned them over to petitioner or his secretary without entering them in the cash receipts book; that some of these

checks were occasionally given back to him by petitioner to be cashed for petitioner or deposited in petitioner's personal bank account, but that he kept no record of them; and that these were the only checks which were not recorded in the cash receipts book. (Tr. 353–363, 371.)

Phillip Anderson, a certified public accountant, testified that he handled the Grocers Packing Company account from October 1945 until May 1947; that he regularly audited the books in preparing monthly and year-end accounts; that he had no knowledge of any income from sacks or "cull" beans; that he prepared the income tax returns for petitioner and his wife for 1945 and 1946 from the books of the company and from information obtained from petitioner; and that in answer to his questions as to "Other items of income" petitioner told him that it would all be found on the books of the company.[3] (Tr. 296–311.)

Internal Revenue Agent Calkins testified that, in investigating petitioner's returns for 1945 and 1946, he found that the returns properly reflected the income recorded on the books, but he was unable to discover in the books any trace of income from the sale of sacks (Tr. 506–510); that peti-

[3] Newman, the certified public accountant who had audited the books before Anderson, prepared petitioner's income tax returns for 1943 and 1944 and included income from the sale of sacks and hog feed. This item was not on the books, however, and he had picked it up "outside." (Tr. 1258–1262.)

tioner then told him that these sales were run through the regular sales account books and all the sacks had been sold to U. S. Bag & Supply Company (Tr. 510–511); that he obtained the cancelled checks from U. S. Bag & Supply Company but still could not locate these sales in the books of Grocers Packing Company (Tr. 511–512); that petitioner then changed his story and said that this money was not recorded in the books but went directly to him as salary (Tr. 512, 604–606); and that he analyzed petitioner's personal bank account and discovered that the proceeds from sack and "cull" bean sales had been deposited there, but never recorded as income on the books of the company, and never reported as income in the returns of petitioner and his wife (Tr. 515–521, 530–557). Petitioner admitted to the agent under oath that he knew the manner in which these sales were being handled, and said that he destroyed the invoices periodically in cleaning out his desk. (Tr. 525–527.)

On June 10, 1949, over a year after the Bureau of Internal Revenue had begun to examine the criminal aspect of the case (Tr. 430–434, 819–820, 992), petitioner and his wife filed amended returns for 1945 and 1946 in which they included the full amounts of income from the sacks and "cull" beans as developed by Agent Calkins' investigation (Tr. 30, 502, 987–989). Petitioner did this at the insistence of his attorney and his accountant who advised him that he could not pre-

vail in a civil suit to recover these deficiency assessments because he would be unable to sustain the burden of proof. (Tr. 818–827, 987–993, 1551–1554, 1659–1663.) The amended returns were forwarded with the following letter (Def. Ex. AF, Tr. 821–824):

> COLLECTOR OF INTERNAL REVENUE,
> *312 North Spring St.,*
> *Los Angeles 12, California.*
>
> DEAR SIR: My attorney, Emmett E. Doherty, Esq., of Los Angeles, California, advised me that an audit of my business and personal records gave rise to a question whether or not I paid all income taxes due for the years 1944, 1945 and 1946.
>
> Please be advised that all my income tax returns were prepared by long established certified public accountant firms, who were well recommended to me by banks and other sources of high repute. Likewise, those firms audited the books of my business organization.
>
> During those periods, I lived modestly, withdrawing from my business only such sums as were necessary for the support of my family. With those exceptions, all other sums remained in the business for working capital.
>
> I believe all taxes due the United States were paid. However, my present auditors advised me that former accounting firms committed many errors, which, they, the present auditors have corrected. I have

been informed and believe that the books are now in good order.

It appears that the records, being unintelligible in some respects, did not reflect a complete business picture. We find errors for myself and my wife as follows—

Years:	Tax
1944	$2,622.08
1945	13,082.50
1946	9,164.54
	24,869.12

Enclosed herewith please find a check in the above amount to be credited to my wife's and my income taxes accounts for the above named years, in amounts as stated. Enclosed also please find amended income tax returns for the same periods for myself and wife, Frances M. Gordon.

Very truly yours,

S LEONARD GORDON,
Leonard Gordon.

LG: nl
enc.

ARGUMENT

1. Petitioner contends (Pet. 3–4, 5, 9–11) that the evidence for the prosecution is circumstantial, that it is as consistent with innocence as it is with guilt, and that it is insufficient to support the verdict. The argument is without merit.

The evidence that the income from sacks and "cull" beans was unrecorded in the books and unreported in petitioner's returns was direct. DeMaris, who set up the books, testified that he was instructed by petitioner to omit this income.

The witnesses who were in charge of the books, DeMaris, Beaumont, Rose and Blacher, testified that it was not recorded. The witnesses who handled the income, Diamond, Hundsdoefer and Blacher, testified that they made no record of it. The witness who made out petitioner's returns, Anderson, testified that he relied on the books and knew nothing of sacks and "cull" beans. Agent Calkins obtained the cancelled checks and testified definitely that they were not recorded as income on the books (Tr. 532, 547, 579, 590, 596), and petitioner himself admitted to Calkins that the income was not recorded. (Tr. 512, 604–606.)

The evidence of wilfulness was circumstantial. Petitioner is a highly successful business man with considerable knowledge of accounting. (Tr. 238–241, 1444–1445, 1488, 1499–1500, 1562.) He was responsible for the unusual manner in which the sack and "cull" bean income was handled and for its omission from the regular books. Although the accountant who prepared his returns in 1943 and 1944 picked up this income from some source outside the books and reported it, petitioner changed accountants in 1945 and told the new one, Anderson, that "Other items of income" would be found on the books of the company. He destroyed the invoices, the sole records of this income. He could hardly have been unaware of such a gross deficiency in his returns—$19,863.97 in income and 34% of the

tax due in 1945, $23,597.20 in income and 76% of the tax due in 1946. (Tr. 534, 551, 557.) He was evasive with the agents during the investigation. And finally his own testimony during the trial was flatly contradicted by several prosecution witnesses. Clearly a reasonable mind might fairly have concluded that there was no reasonable doubt as to petitioner's guilt. *Curley* v. *United States,* 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C. A. 9), certiorari denied, 342 U. S. 909.

From the foregoing it is quite obvious that the record does not support petitioner's contention (Pet. 3–4, 8, 9–11) that the "sole evidentiary basis" for the conclusion that income was omitted from the returns was the expert testimony of the agents, Calkins and Marshall. Moreover, the testimony of Calkins was sufficient proof in itself, for he testified that he could not trace the sack and "cull" bean income deposited in petitioner's personal account into the company's cash receipts book, into any special account receivable, or into any of the miscellaneous accounts.[4] (Tr. 511–521, 568–570, 577–596.) The contention that the books of the company were in "chaos" is contra-

[4] In 1944 Newman, the accountant making out petitioner's income tax returns, picked up over $9,000 in income of this sort from some place outside the record. As a result the returns for that year did not balance with the books, contrary to what Agent Calkins discovered for 1945 and 1946. (Tr. 598–599.)

dicted by the accountants, Anderson (Tr. 312–314, 348–349) and Newman (Tr. 1263–1264, 1267), who testified that they were generally adequate although they failed to take into account the particular income involved here.

2. Petitioner contends (Pet. 4, 8, 11–12) that the trial court erred in admitting in evidence "summaries" prepared by Agent Calkins to illustrate his testimony. When these "summaries" were distributed to the jury the trial judge explained that they were based upon the evidence already before the court, and that they were not controlling in themselves but were prepared merely to enable the jury to follow Calkins' explanation of the voluminous evidence. (Tr. 464–465, 502–504.) They were based upon the checks and invoice copies obtained from the purchasers (Tr. 34–38, 200AA), petitioner's tax returns and bank records (Tr. 28–32, 179–182), and Calkins' own testimony as to his examination of the company books (Tr. 530–558). They were, therefore, based entirely upon evidence in the record. Whether the agent also had "work-papers," transcribed from the company books, was, therefore, immaterial. Actually, most of the "work-papers" were made available to defense counsel (Tr. 560–568) and he could have had the remainder had he so desired (Tr. 623–624). Furthermore, the original books themselves were produced by defense counsel in cross-examining Calkins. (Tr. 570–571.) The use of such "sum-

maries" is well recognized. *United States* v. *Johnson,* 319 U. S. 503, 519; *Gendelman* v. *United States, supra.*

3. Petitioner contends (Pet. 4, 8, 12–15) that the amended returns, being offers to compromise his civil tax liability, were erroneously allowed in evidence as admissions against interest. He contends that he did not intend to admit anything by filing them.

As has been pointed out (*supra,* pp. 8–10), these amended returns were filed long after petitioner was aware that criminal proceedings were being contemplated; they accepted the deficiency figures as determined by Agent Calkins' investigation; and they were forwarded with a letter which said, "We find errors for myself and my wife," and which contained a check for the stated amount. At the trial petitioner's counsel argued strenuously that the court should take evidence, out of the presence of the jury, to determine whether the amended returns were admissible as admissions against interest. The court, however, ruled that they were *some* evidence of an admission, and that the weight to be given them was a matter for the jury to determine in the light of all the circumstances. (Tr. 471–501.) Thereafter, petitioner, his accountant, and his attorney, all testified that he had not intended to admit anything by filing the amended returns but was simply seeking to settle the civil controversy.

(Tr. 485–487, 813–828, 833–835, 987–993, 1551–1561, 1659–1663.)

The trial court was clearly correct. The issue raised by petitioner's objection was the relevance of the amended returns, *i. e.*, whether they tended to prove that reportable income had been omitted from the original returns. They had such a tendency if they constituted admissions of error in the original returns; they had no such tendency if they were merely intended to settle a civil controversy in which petitioner conceded nothing but realized he could not prevail. Whether an offer to pay a claim is an admission against interest, and therefore relevant to an issue before the court, depends upon the circumstances under which it was made. IV Wigmore, *Evidence* (3d ed., 1940), Secs. 1048 (1) (b), 1061. Had this been clearly an offer to compromise a disputed civil liability, or had it been clearly done solely to dispose of the civil case, and had it been clear that no admission of fact was intended, the returns would have been inadmissible. But it was apparent that the amended returns had been filed while a criminal prosecution was in the offing, that they accepted the Government's figures without question, and that the accompanying letter admitted errors. They were certainly *some* evidence, at least, of an admission by petitioner that he had omitted income which should have been reported in his original returns. Whether

he actually intended such an admission was a question for the jury in the light of all the evidence. *United States* v. *Rosenblum,* 176 F. 2d 321, 330 (C. A. 7), certiorari denied, 338 U. S. 893; *Heindel* v. *United States,* 150 F. 2d 493 (C. A. 6); *Cooper* v. *Brown,* 126 F. 2d 874, 878–879 (C. A. 3); *Emmich* v. *United States,* 298 Fed. 5, 9–10 (C. A. 6), certiorari denied, 266 U. S. 608.

The charge to the jury has not been included in the record before this Court. It must be assumed, therefore, that the trial court properly left it to the jury to determine what weight, if any, was to be given to the amended returns. Petitioner sets forth in a footnote (Pet. 14) an "instruction" which he asserts was read to the jury. Actually, this was read to counsel in chambers while proposed charges were being discussed, and was not accepted by the trial judge because it did not adequately state petitioner's position. Petitioner's counsel asked leave to consider the trial judge's proposed revision overnight. (Tr. 1285, 1311–1314.) The record does not show what the jury were eventually told.

4. Petitioner contends (Pet. 4, 15–16) that the trial court erred in refusing certain specific requested instructions. The record in this Court contains those instructions requested by petitioner and not given. Some were simply refused; others

were refused as being already covered in other instructions. (R. 32–56.) The record also contains the discussion of the proposed charge in chambers, to which reference was made in the previous point. At the conclusion of this conference there were still several points to be clarified. (Tr. 1285–1323, see particularly 1301, 1306–1307, 1310–1314, 1320, 1322.) The record does not contain the charge which was finally given.

Petitioner confines his argument on this point to a recitation of the various proposed instructions which the trial court allegedly refused to give. Obviously this Court cannot review the charge in the absence of a proper record.

5. Finally, it is contended (Pet. 4, 17–18) that Counts Two and Four, the counts involving the wife's returns, should have been dismissed on grounds of double jeopardy. Since the sentences on these counts are concurrent with the sentences on Counts One and Three on which petitioner was properly convicted, there is no need to consider this alleged error. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105; cf. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642.

CONCLUSION

The decision below is clearly correct, and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953